Standard Sheet Metal, Inc. *and* Sheet Metal Workers International Association, Local Union No. 162, AFL–CIO. Cases 32–CA–15675, 32–CA–15770, and 32–RC–4199

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

On September 25, 1997, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief. The General Counsel filed cross-exceptions, a supporting brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Standard Sheet Metal, Inc., Fresno, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its Fresno, California, facility copies of the attached notice marked 'Appendix.'[59] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 21, 1996."

Virginia L. Jordan, Esq., for the General Counsel.
Mark R. Thierman, Esq. (*Thierman Law Firm*), of San Francisco, California, for the Respondent.
Mark S. Renner, Esq. (*Wylie, McBride, Jessinger, Sure & Plattan*), of San Jose, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Based on the unfair labor practice charge in Case 32–CA–15675, filed by Sheet Metal Workers International Association, Local Union No. 162, AFL–CIO (the Union), on September 13, 1996,[1] and the unfair labor practice charge in Case 32–CA–15770, filed by the Union on October 25, the Regional Director for Region 32 of the National Labor Relations Board (the Board), on December 19, issued a consolidated complaint, alleging that Standard Sheet Metal, Inc. (Respondent) had engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Also, on December 19, the aforementioned Regional Director issued a report on objections and challenged ballots in Case 32–RC–4199 and consolidated the issues raised therein for hearing with the unfair labor practice issues

[1] The judge found that the Respondent violated Sec. 8(a)(1) in several instances. We note that the Respondent has excepted only to the 8(a)(1) finding that it unlawfully videotaped employees.

The General Counsel's exceptions do not contend that there was a supervisory position for which job applicant Fred Venglarcik should have been considered. Thus, we find it unnecessary to pass on the judge's discussion in the second paragraph of fn. 48.

Member Brame finds it unnecessary to pass on the judge's finding that the Respondent did not violate Sec. 8(a)(1) when, in a telephone conversation on or about May 20, 1996, an unidentified woman asked Venglarcik if he had ever worked for an open shop because the violation, if found, would not materially affect the remedy. Thus, Member Brame does not pass on the judge's finding that the woman who spoke to Venglarcik was not shown to be an agent of the Respondent.

The General Counsel's exceptions contend that the Respondent unlawfully failed to consider Venglarcik for an open nonsupervisory position in June 1996 that was filled by David Schoolen. Member Brame finds no merit to the General Counsel's contention because it was not fully or fairly litigated. At the hearing, counsel for the General Counsel asserted that there were two unlawful refusals to hire, in June and in August 1996, and that the first refusal concerned either a "straight installer" job or a leadman job. Schoolen was hired on June 28 as an apprentice mechanic/installer. Counsel for the General Counsel did not assert at the hearing that the Respondent unlawfully failed to hire Venglarcik for this position, and introduced no testimony or evidence concerning the decision to hire Schoolen. In contrast, various witnesses testified in detail about the Respondent's hiring decisions in early June for positions eventually filled by Manuel Martinez and Richard Hill and its hiring decisions in August for positions filled by employees Kenneth Maldanado, Ramiro Munoz, and Jason Israelian. In these circumstances, Member Brame agrees with his colleagues that the General Counsel's exceptions are without merit.

Member Brame also would not find merit in the allegation that the Respondent violated Sec. 8(a)(1) of the Act by videotaping a union demonstration conducted on a public street outside the Respondent's office and shop facility. The demonstration was conducted in the open, and the videotaping unaccompanied by threats or other conduct that would suggest coercion. Member Brame believes that whether employer videotaping violates the Act depends, as with other alleged 8(a)(1) conduct, on whether, under the particular circumstances, the conduct would reasonably tend to "interfere with, restrain, or coerce employees" in the exercise of protected rights. See *United States Steel Corp. v. NLRB,* 682 F.2d 98, 101–104 (3d Cir. 1982). Given the open and public character of the demonstration, as well as the absence of other factors objectively indicating coercion, Member Brame is unable to conclude that the employer's photography trangressed the Act

[2] In setting aside the election on the basis of meritorious objections, the judge found it unnecessary to resolve the challenges to the ballots of several voters. We note that no exceptions have been filed to this finding.

[3] In accord with *Excel Container, Inc*., 325 NLRB 17 (1997), we shall change the date in par. 2(f) of the recommended Order from June 1 to May 21, 1996, the date of the first unfair labor practice.

[1] Unless otherwise specified, all events herein occurred within 1996.

of the consolidated complaint. Respondent timely filed an answer, essentially denying the alleged unfair labor practices. Thereafter, the issues, raised by the consolidated complaint and the report on objections and challenged ballots, came to trial, before me on February 25 and 26, 1997, in Clovis, California. During the trial, all parties were afforded the opportunity to examine and to cross-examine all witnesses, to offer into the record any relevant evidence, to orally argue their legal positions, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel and by counsel for Respondent, and each has been carefully considered. Accordingly, based on the entire record, including the posthearing briefs and my observation of the testimonial demeanor of each of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a State of California corporation, with an office and place of business located in Fresno, California, is engaged in the business of the nonretail fabrication and installation of sheet metal products, including air-conditioning systems. During the 12-month period, which immediately preceded the issuance of the consolidated compliant, which period is representative, in the normal course and conduct of its above-described business operations, Respondent purchased and received goods, valued in excess of $50,000, directly from suppliers, which are located outside the State of California. Respondent admits that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The consolidated complaint alleges that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (3) of the Act, by, on or about May 20 and since said date, refusing to hire an individual, Fred Venglarcik,[2] because of his membership in the Union; by, in late July, suspending employee Charles Whitehead because of his support for the Union; and by, on or about September 13, removing employee Whitehead from a prevailing wage job and ordering him to return to the shop because of his support for the Union. The consolidated complaint also alleges that Respondent engaged in acts and conduct, violative of Section 8(a)(1) of the Act, by interrogating a job applicant about his membership in the Union and his Union activities, informing job applicants that Respondent was an open shop, requiring a job applicant to execute a waiver of union affiliation as a condition of employment, informing a job applicant that his affiliation in the Union was preventing Respondent from hiring him, interrogating employees about their union activities and sympathies, threatening an employee that Respondent would close its business if the employees selected the Union as their bargaining representative, engaging in surveillance of its employees' union activities by videotaping a union demonstration in front of its facility, and ordering an employee to leave its shop facility because he was wearing a prounion T-shirt. Respondent denied refusing to hire Venglarcik because of his union membership, affirmatively alleging that Venglarcik had originally been rejected for hire into a supervisorial position, and denied suspending employee Whitehead because of his support for the Union. With regard to removing Whitehead from a job, Respondent contends that such resulted from the latter's disruptive conduct and refusal to adhere to an established dress policy. Finally, Respondent denied the commission of any of the alleged Section 8(a)(1) violative conduct.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent, a State of California corporation, with a place of business in Fresno, California, is engaged in the fabrication of sheet metal products, including the installation of air-conditioning systems. The record establishes, and Respondent admits, that Ray Griesner is the owner of the business and the president of the corporation; that Russ DeJohn is its general manager; that Steve Santos is the shop superintendent; and that Steve Torres performs four distinct job assignments for Respondent—salesman, estimator, tracking technologist, and health and safety administrator.[3] The record further establishes that Respondent employs approximately 25 to 30 journeymen and apprentice sheet metal workers; that, on August 5, the Union filed its representation petition in Case 32–RC–4199, seeking an election for selection as the bargaining representative of Respondent's full-time and regular part-time fabrication, installation, adjustment, alteration, repair, and service employees; and that the said representation election was held on September 17, with 9 votes cast for and 10 against the Union.

According to alleged discriminatee, Charles Whitehead, who worked for Respondent from July 1995 through September 1996, the Union's organizing campaign amongst Respondent's sheet metal workers commenced in early May when he went to the Union's office and spoke to two agents, Frank Flores and Lucy Arnot. He signed an authorization card and, thereafter, between May and the end of July, spoke to other employees, informing them of their right to representation and directing them to the Union. Whitehead testified that, months before he contacted the Union, in the fall of 1995, his foreman, Manuel Martinez, warned him "that if I talked to any of the Union guys . . . on the job, he would send me home for the day." Martinez, who testified on behalf of Respondent, failed to deny the comment, which was attributed to him.

Alleged discriminatee, Frederick Venglarcik, who has been a member of the Union for approximately 10 years and who, as a journeyman sheet metal worker and as a foreman, has had experience working on prison air conditioning installation jobs, testified that, on or about May 20, he saw an advertisement, in the *Fresno Bee* newspaper, for an air-conditioning installer/leadman and a phone number. He called the telephone number, and a women answered. When Venglarcik identified himself and said he was calling in reference to the newspaper advertisement, the woman gave the telephone to another woman, who said he was "speaking to Standard Sheet Metal." She then said, "they were taking applications over the tele-

[2] Venglarcik's name has been incorrectly spelled throughout the transcript, and counsel for the General Counsel's motion to correct the transcript to reflect the correct spelling is granted.

[3] Respondent admits that Griesner, DeJohn, and Santos are supervisors within the meaning of Sec. 2(11) of the Act and that Griesner, DeJohn, Santos, and Torres are agents within the meaning of Sec. 2(13) of the Act.

phone" and "asked if I ever worked on a prison before . . . ." The alleged discriminatee recounted his prior work experience at prisons, and the woman then "asked me if I ever worked for an open shop before." Venglarcik said, no, and the woman said someone would return his call. Not awaiting a return telephone call, he went to Respondent's Fresno office and shop facility the next day in order to obtain an employment application and, inside the facility, encountered Ray Griesner, who, he knew, is the owner of Respondent. Venglarcik took an employment application, completed it at home, and, the next morning, returned to Respondent's facility. He gave the application to a receptionist, who, in turn, handed it to Griesner, who was standing in the office. According to Venglarcik, the former glanced through it and asked what he had done for each of the listed past employers.[4] Then, Griesner "asked me if I was still a member of the union," and "I told him, no, I wasn't. I told him to hell with the union, I'm just looking for a job." Griesner then asked, "had I ever worked at a non-union establishment" to which the alleged discriminatee answered "no."[5] The conversation ended with Griesner saying someone would telephone Venglarcik.

Two days later, on May 23, Venglarcik testified, Russ DeJohn telephoned him and, after identifying himself, asked the former to speak to Respondent's secretary in order to arrange a time and date for an interview. The alleged discriminatee did so and, at 5:30 in the afternoon on May 30, met with DeJohn in the latter's office at Respondent's facility. According to Venglarcik, they shook hands, and the conversation immediately turned to "all my previous employers, what jobs I had been on, what jobs I had ran as a foreman." DeJohn then said "they were looking for somebody [with] . . . experience on prisons"[6] and asked "if I had ever worked on a prison or been a foreman on a prison." Venglarcik responded affirmatively and explained that he "[had been] a foreman for AMA Mechanical at Coalinga Prison and Susanville Prison." When he finished describing his work experience at prisons, DeJohn handed him a sheet of paper, Respondent's Exhibit 1, bearing the title, *"Foreman/Leadman Job Description"* and an effective date. Said document enumerated nine job responsibilities of a foreman/leadman, including to "run installing crew and maintain proper supplies at job site,"[7] and DeJohn "explained that . . . I had pretty much covered if not more than what that sheet . . . . stood for."[8] Then, DeJohn turned to what Venglarcik had set forth, on his application, as his desired wage rate, saying that "$15 an hour . . . . was a little steep" and explaining that most of Respondent's installers started at $10 per hour, and "if you proved to be well worth it, within one year . . . a lead man would be making $12 an hour." He added that if Venglarcik was as good a worker as he claimed, "there would be no problem with giving [him] that couple of dollars extra per hour." At this point in the conversation, according to Venglarcik, DeJohn "asked me about my union affiliation"[9] and, looking through some papers on his desk, said "that there was some sort of form that I needed to sign to waive my union affiliation." DeJohn, however, was unable to find the document and said Respondent was in the process of "making more."[10] Thereupon, the meeting ended with DeJohn saying he and Griesner "and a few other associates there"[11] would review Venglarcik's application and "get back" to him.

Notwithstanding what DeJohn said and having heard nothing with regard to being hired, on June 7, Venglarcik telephoned Respondent's office and spoke to the receptionist, who said "that the position had been filled but I . . . was still being considered for a job there." A week later, according to the alleged discriminatee, he again telephoned Respondent and was put through to DeJohn. Venglarcik asked about his chances of being hired, and DeJohn said "they were still working on something about my union affiliation . . . and they were trying to work around [it]." Venglarcik then asked if this was acting as an impediment to him being hired, and DeJohn responded, "not in a direct way that it was, but in a way it was." The latter concluded by assuring Venglarcik that Respondent would be in contact with him.

Venglarcik heard nothing further from Respondent until one afternoon in mid-August at which time he received a "pager" message and telephone number. He called the number, and an unidentified individual said that he had reached Respondent's office, that he was still being considered for a position there, and that they would like him to come in for another interview later in the afternoon.[12] Venglarcik agreed to do so and arrived at Respondent's office at approximately 6 p.m. A man approached him, identified himself as Steve Santos, and told Venglarcik that he had to complete another job application. The latter did so "right in front of [Santos]," and, as he wrote, Santos "asked me if I had ever worked in a non-union shop." Venglarcik said, no, and Santos then "wanted to know if I had ever worked as a foreman . . . ." The latter said that he had, and Santos asked about his foreman qualifications, explaining that Respondent's foremen sometimes would "come back in" and "would fabricate their own fittings for field installation" Venglarcik said this would be no problem, adding that he was a fast learner and could "grasp" things quickly. The conversation concluded with Santos saying he would speak to Griesner and telephone Venglarcik; however, he never did.

Charles Whitehead testified that, on Thursday, July 11, he was working at an Albertson's grocery market in Fresno. During a break period, he sat in the shade with other employees,

[4] On his application form, Venglarcik stated that he was applying for a sheet metal worker job.

[5] Griesner did not testify at the trial and, therefore, of course, failed to deny what was attributed to him.

[6] Respondent had recently been awarded the contract for an air conditioning installation project at the Corcoran State Prison, located in Corcoran, California, which is 60 miles from Fresno. There is no dispute that Respondent was scheduled to commence its installation operations there in July or August and that, at the time of DeJohn's interview with Venglarcik, it was in the process of assembling its management team for the project.

[7] Venglarcik understood that running a crew meant assigning a work crew to jobs depending on the work requirements.

[8] Venglarcik conceded that, although DeJohn did not describe the available job in detail, he believed that what the former discussed was a supervisory position.

[9] Venglarcik stated that, at least, one of the past employers, listed on his employment application, was a known union shop. DeJohn conceded knowing that some of the past employers, which Venglarcik listed on his application, were union contractors.

[10] During cross-examination, Venglarcik said he told DeJohn that he was no longer a member of the Union.

[11] DeJohn conceded discussing Venglarcik's application with Griesner.

[12] Respondent does not dispute that it called Venglarcik in for another interview but offered no explanation as to who directed that such be done or as to the surrounding circumstances.

"and I brought up the fact that I felt that I was short some pay on a certain job . . . ." [13] Although unclear in the record, Whitehead was referring to an earlier prevailing wage job on which he worked and was paid as an apprentice but believed he should have received a journeyman's wages as he was the only nonsupervisory employee on the job. Manuel Martinez, who was sitting nearby and was the foreman, "brought up the fact that if I was working for the Union, I wouldn't have received that money either." Whitehead replied that he should have been paid the prevailing journeyman's wage, meaning union scale, rather than the apprentice scale and that Respondent "found reasons that they felt I didn't deserve full scale." Martinez again said "if you were working in the Union, you wouldn't have received that pay either." To this, Whitehead retorted that, if he were in the Union, he would not have been in that situation, "and [Martinez] said that he worked in the Union for x amount of years, and it's not that way." Then, according to Whitehead, Martinez began saying things which "offended my thoughts of the Union and what I felt," and "I said that, in the Union, you're offered your health care and your benefits. I have no health care and benefits at Standard Sheet Metal. And in the Union, you get vacation pay [but not at Standard Sheet Metal]." To this, Martinez said that things also do not always work out with the Union. Apparently, the break period ended at that point, and the employees returned to work.

The next day, Friday, Whitehead testified, he was working at the Albertson's job and reached 40 hours of work for the week at approximately noontime. Respondent "did not pay overtime so I was asked to leave" the jobsite, and he drove to its office and shop facility in Fresno in order to pick up his paycheck. Upon entering the office, he spoke to one of the two secretaries and requested his paycheck. The secretary replied that he would be paid after a mandatory safety meeting later that afternoon. Whitehead replied that he did not want to wait until after the safety meeting, and "I would like to pick up my check at that time." The secretary said she could not give him his paycheck at that time and would have to speak to Steve Santos. She reached him by Respondent's "two-way radio," and Santos said he would return to the office. He arrived at 1:30, said nothing to Whitehead, and, an hour later, "called me into his office where I met with [him] and Russ DeJohn. And at that time, [DeJohn] informed me that . . . . I had a bad attitude on the job, and it was affecting the others, and . . . I would be suspended indefinitely." Without offering any further explanation, either Santos or DeJohn asked if he would be quitting; Whitehead said he would not quit and asked how long his suspension would last. DeJohn said that the suspension was for 1 week and handed a disciplinary notice to Whitehead, which he signed. The document, General Counsel's Exhibit 6, is divided into three parts. The upper part, headed "Employee" and to which Whitehead affixed his signature, states as a reason for his discipline, "extreme negative attitude toward company & training program—promotes low morale"; the middle portion, headed "supervisor" and signed by Santos, states, as the action recommended, "due to current work load slow down—immediate suspension of employment effective 7–12–96 to 7–19–96";[14] and the lower portion, signed by DeJohn affirms the recommendation of Santos. Notwithstanding what was written on the suspension document, Whitehead denied that such was mentioned as a reason for his suspension by either DeJohn or Santos and that, in fact, there existed a slowdown in work at the Albertson's project.

On July 19, Whitehead returned to work following his suspension and, for the next 5 weeks, worked exclusively inside Respondent's shop facility. He testified that, approximately "every two days" during this time period, Steve Torres approached him with Union-related comments and questions. Thus, according to Whitehead, on at least 10 occasions, Torres initiated conversations, asking such "questions as 'where do you guys meet with the Union?'" To these, Whitehead would reply that he did not know what Torres was talking about. On other occasions, Torres "asked what we thought about the Union involvement in the shop. He explained . . . that he worked in union at Fruehoff and explained the down sides of his dealings with union workers . . . and basically he just tried to pump me for information about the Union." Whitehead recalled two such instances in particular. On one occasion, he was having lunch with another employee when Torres approached and began speaking about his dealings with the Union. Whitehead walked away toward the timecard rack but Torres followed and, beside the time clock, said, "You know, if the shop decides to go union, Ray will just close the doors." Whitehead nodded his agreement. As to the second, while he was working one day, Torres approached "and said a Frank Torres . . . or Flores or something like that had called for me." Whitehead asked what the man wanted, and Torres said, "You know who I'm talking about, right? That short Mexican guy." Whitehead feigned ignorance, and Torres said, "You know, the guy that comes to the job sites looking for you." When Whitehead asked who Torres was talking about, the latter turned and walked away. Steve Torres specifically denied interrogating Whitehead as to the location of meetings, threatening Whitehead with the shutting of the business, or asking Whitehead what he thought of the Union. Torres added that "I never addressed Mr. Whitehead about any Union issues."

Corroborating Whitehead, Artist Morgan, who worked for Respondent as a foreman from May 1995 through September 1996,[15] testified with regard to a similar conversation with Steve Torres. According to him, subsequent to the filing of the election petition by the Union, he spoke to Torres once or twice

[13] Although unclear in the record, Whitehead was referring to an earlier prevailing wage job on which he worked and was paid as an apprentice but believed he should have received a journeyman's wages as he was the only nonsupervisory employee on the job.

[14] Santos testified but failed to explain his notation on the suspension document.

[15] Morgan testified that, while he normally worked with just one other employee on jobs for Respondent, he did work on jobs, for Respondent, on which he was the foreman of a five or six man crew. On such occasions, he was responsible for "running" the crew, which means that "I gave them their assignments as to what I wanted them to do . . . ." In this regard, according to Morgan, he possessed "discretion" as to which employees would be assigned to particular jobs, and "I would move the person to the other part of the job" if the construction plans required such. Further, if Morgan believed that an individual was not performing his assigned job in a suitable manner, he possessed the authority to reassign him to another job. On other matters, such as discipline, overtime, and granting time off from work, Morgan was not permitted to act unless authorized by Respondent. Morgan further testified that, as of the date of the representation election, September 17, he, Manuel Martinez, and Ken Swanson were Respondent's foremen; that all were included on the election eligibility list and voted in the election without challenge; and that he acted as the Union's observer during the election.

a week about the Union "in the front office" at Respondent's shop facility. "He would ask me what my feelings were about the Union and how I was going to vote, where the Union was having their meetings . . . . I told him I wasn't involved in it, and didn't have anything to say about it." Nothing more would be said. Torres failed to deny this testimony.

At some point in July or August, Respondent began its air conditioning installation project at the Corcoran State Prison, and Charles Whitehead was assigned to work there under Manuel Martinez, the foreman on the jobsite. On the Friday before he was to begin work at Corcoran, in the shop following a safety meeting, the alleged discriminatee spoke to Steve Santos regarding a dress code[16] at the prison. According to Whitehead, Santos informed him that he was to report to the state prison on Monday. "And I asked about the dress code because I had heard rumor about wearing blue jeans to the prison and that was not allowed. And he said, 'Just don't wear blue, black, or orange, but you can wear jeans right now. That's okay because we're not working in the prison.'" Santos seems to have been referring to Respondent's worksite outside the walls of the prison, which was known as Corcoran II. Respondent had also been awarded a contract for air-conditioning installation work inside the prison, a jobsite known as Corcoran I, and, apparently, the dress code for the latter was slightly different. Thus, Whitehead testified, on September 12, Martinez told him to report to prison officials the next morning in order to pick up an identification badge to wear while working inside the prison. Martinez added that he should not wear blue jeans inasmuch as the inmates wear them.

On September 13, Whitehead went inside the state prison in order to obtain his identification badge; underneath beige coveralls, which were buttoned up the front, he wore a dark blue union logo T-shirt and blue jeans. Whitehead was given an identification badge and then reported to Respondent's Corcoran II location for work. Besides Manuel Martinez and Whitehead, four other employees of Respondent were working that morning at the Corcoran II worksite—Allan Buschnoff, Ken Maldonado, Adam Bernal, and Jason Israelian. According to Whitehead, at approximately 8:30 a.m., a company delivery truck, driven by David Schoolen, arrived, and while helping to unload, he offered to give the former a prounion button. Schoolen informed Whitehead that he was already wearing a "vote no" button and showed it to the alleged discriminatee.[17] At this point, Whitehead testified, he "decided that if [Schoolen] was going to wear buttons, then I could wear my vote yes Union T-shirt. So I took my beige coveralls off."

Whitehead further testified that, an hour later while he was working, Martinez approached and said "that I couldn't wear that shirt on the job, that I needed to take it off." Whitehead replied that what he was wearing was what he wore to work. Martinez insisted that he could not work, wearing that shirt. Thereupon, believing he needed some witnesses to the confrontation, Whitehead yelled that Martinez was telling him he could not work, wearing a union logo T-shirt. To this, Martinez replied that "he wasn't kicking me off the job, I just couldn't work out there with that T-shirt on." Whitehead repeated his assertion that Martinez was kicking him off the job because he was wearing a union T-shirt, and Martinez again denied that he was removing Whitehead from the job but only that he could not continue to wear that T-shirt.[18] At this point, Whitehead removed the T-shirt, saying, '"Well, I can't work out here without a T-shirt.' And he said, 'Put your shirt back on'" and "Put your coveralls back on." Whitehead refused to honor Martinez' instruction, saying it was hot and he wanted "to voice my opinion on how I feel about the Union." He added that, if other employees can wear "vote no" buttons, he could wear a union logo T-shirt. At this point, according to Whitehead, another employee[19] pointed out that Martinez himself was wearing a "vote no" button. Martinez immediately said he would remove it, did so, and asked Whitehead to take off his T-shirt. Once again, Whitehead refused, and Martinez ordered him to leave the jobsite and report back to Respondent's shop facility.[20]

As instructed, Whitehead drove back to Respondent's Fresno facility, arriving there at approximately 10 a.m. He testified that, on entering the building, he observed Ray Griesner standing by the door to the office, and, obviously noticing Whitehead, the former said, "Get out of my office. Get out of my shop with that shirt on." Russ DeJohn then walked out of the office and[21] "stated that I could not wear this shirt on the job, that I was out of the company dress code, and that it was not an appropriate shirt to wear. And I asked, 'Is it because its a Union shirt?' He said, 'Its not an appropriate shirt to wear.'" DeJohn then told Whitehead to wait and walked back inside the office with Griesner. Approximately an hour later, "DeJohn called me into that office and said that I was out of dress code for the company and that I needed to change my shirt and that if I did so, I could continue working in the shop for the rest of the day." The alleged discriminatee replied that the company dress code was blue, button-up shirts, which couldn't be worn on the Corcoran jobsite. DeJohn repeated that he just wanted Whitehead to obtain another shirt from someone in the shop and work there.[22] Whitehead refused, saying the Corcoran job was a

[16] According to Whitehead, while Respondent's employee handbook requires that employees wear blue, button-up cotton shirts, without any sort of writing, during work and while he adhered to the dress code 90 percent of the time, the remainder of the time he "wore T-shirts, usually white T-shirts with logos on the front and the back." He added that he wore such T-shirts inside Respondent's shop and on job sites in the plain view of management officials.

[17] Schoolen wore the button on his shirt pocket.

[18] During cross-examination, Whitehead said that Martinez never threatened to fire him from the Corcoran project. However, when confronted with his pretrial affidavit, in which he stated that Martinez had so threatened him, the alleged discriminatee admitted that such was a fabrication and merely his interpretation of what Martinez said.

[19] During cross-examination, Whitehead identified the employee as Ken Maldonado. Upon being confronted with his pre-trial affidavit, in which, he failed to mention Maldonado's interjection, Whitehead averred that he did not want to involve the former in this matter. Maldonado testified at the trial but neither counsel for the General Counsel nor counsel for Respondent asked him about this incident.

[20] According to Whitehead, that morning, another employee, Adam Bernal, "was wearing a blue T-shirt, very close shade to the same color of blue I was wearing which is a dark blue," with logos on the front and on the back. Whitehead recalled seeing Bernal on the Corcoran project for at least, 2 weeks prior to the incident.

[21] During cross-examination, Whitehead said that he told DeJohn he had been sent back to the shop and why—"I told him I was sent . . . back to the shop for wearing a blue T-shirt . . . . I didn't say blue. I said I was sent home for wearing a Union T-shirt."

[22] During cross-examination, Whitehead testified that another employee had once been sent home from the shop for wearing a union logo T-shirt. He added that employees, including him, had worn other types of T-shirts to work in the shop and had never been ordered to change them.

prevailing wage job and asking why he should take a pay cut for wearing a union T-shirt. Then, DeJohn said he was out of the prison dress code. Whitehead asked him to define the dress code for him, "and he stated to me that you couldn't wear blue, black, orange, blue jeans. . . . And he said if I changed my shirt, I could go back out to the prison.[23] And I said, 'You mean, if I got a white shirt that says Union yes, I could go back out to the prison?' And he said, 'Yes.'" Thereupon, Whitehead left the shop in order to obtain a different T-shirt and return to the prison; however, inasmuch as, by then, it was close to 1 p.m. and as "by the time I had returned to the job site, it would have been time to come back," he went back to Respondent's shop and worked the rest of the day at that location, for which time he was paid but not at the Corcoran job prevailing wage rate.

There is no dispute that, one afternoon in August, subsequent to the filing of the election petition by the Union, individuals, including officials of the Union, engaged in a demonstration in the public street in front of Respondent's office and shop facility in Fresno and that Steve Torres videotaped what occurred. The videotape establishes that the demonstrators carried no placards or signs; that, at no time, did any of them enter onto Respondent's property or onto the public sidewalk in front of its facility; and that there is no evidence that the demonstrators inhibited ingress to or egress from Respondent's property. While Torres testified that no employees of Respondent appear in the videotape, he did identify an individual, named Paul Bidard, who can be viewed therein speaking to some of the demonstrators, as an employee of a neighboring company. Torres denied that Paul Bidard is the name of any of Respondent's employees. In this regard, I note that, on General Counsel's Exhibit 7, Respondent's listing of employees, eligible to vote in the representation election, the name of Paul Bedard appears and that counsel for the General Counsel contends that the eligible employee, Paul Bedard, is the individual, who appears in the videotape. With regard to Respondent's defenses to the consolidated complaint allegation that it unlawfully failed and refused to hire Fred Venglarcik, Russ DeJohn testified that, by the time of his conceded interview of the former in late May,[24] Respondent had already been awarded the contract for the installation of air conditioning in the office buildings and warehouses at the Corcoran State Prison and, as its decision was to not fill the position in-house,[25] had commenced the hiring process for a project coordinator,[26] who would be responsible for overall supervision of Respondent's employees on the project and for the purchasing of equipment and materials. Also, according to DeJohn, as of the end of May, while Respondent intended to use Manuel Martinez as its leadman on the state prison job, it had not yet determined a starting date for his transfer to that job. On this point, DeJohn later conceded that "we were contemplating the size of the project, possibly getting . . . another leadman."[27] During cross-examination, asked if, at the Corcoran State Prison job, Respondent would have utilized a project coordinator, foreman, and leadman, DeJohn said "leadman, supervisor would be really kind of the same." Asked if there was going to be both a supervisor and a leadman, DeJohn said, "There would be a coordinator and a leadman" and reiterated there would not be a supervisor and a leadman on that job—" Its the same." DeJohn further testified that he began his interview of Venglarcik cognizant that the latter had applied for a sheet metal worker job.[28] Asked if any sheet metal worker jobs were available at the time, DeJohn said "Not specific. We tend to run adds at various times just to keep it open. . . ." In fact, according to Respondent's Exhibit 9, Respondent hired no installers until June 28 when David Schoolen was hired as an apprentice mechanic/installer. Rather than any sort of supervisory position and that "he came in, and I briefly discussed . . . what our company is and who we are, and then proceeded to ask what . . . his experiences were. . . . I was looking at his application so it had some company names . . . but asked for some specifics . . . . He talked about being a supervisor running men on projects, several men usually, and . . . assigning jobs . . . and then went on to explain about ordering material, making purchases, actually working on submittals beyond what an installer . . . would do. . . . And during that . . . I introduced . . . we were looking for a project coordinator for the Corcoran prison job."[5] DeJohn decided to move Venglarcik's interview in this direction "mostly when asked to describe his experiences . . . and the way [Venglarcik] was describing them, what he was describing . . . he actually performed, knowing the other needs that I had . . . ." At this point, according to DeJohn, he showed Venglarcik Respondent's job description for a project coordinator, and they spoke "about the items in a little bit more detail, and then . . . I brought up the Corcoran prison job, and he may have mentioned . . . descriptions of his jobs, he said they were actually prison jobs. . . ." DeJohn testified that he made it clear to Venglarcik that the position Respondent would consider him for was the "coordinator" job and that the latter was aware he would not be hired as a foreman—"I believe so . . . . I feel I conveyed that it had switched from that to coordinator."[30] DeJohn stated that the interview concluded at that point, with him having a positive feeling about

[23] During cross-examination, Whitehead stated that DeJohn explained that he was out of the prison dress code and had to change his shirt because the T-shirt, he was wearing, was blue.

[24] DeJohn testified that while, in May, Respondent had placed an advertisement in the *Fresno Bee* for a sheet metal worker, there was not really a position open at the time and that the advertisement was Respondent's attempt to obtain employment applications from qualified individuals, who would be contacted when work became available.

[25] DeJohn testified that Respondent's initial plan was to utilize a current employee as the project coordinator but that it later decided to hire a "new person" for the position.

[26] According to DeJohn, Respondent placed an advertisement, which ran at approximately the same time as the sheet metal worker advertisement, in the *Fresno Bee*, for an individual to fill the project coordinator position. Respondent offered no corroboration for this testimony.

[27] During cross-examination, asked if, at the Corcoran State Prison job, Respondent would have utilized a project coordinator, foreman, and leadman, DeJohn said "leadman, supervisor would be really kind of the same." Asked if there was going to be both a supervisor and a leadman, DeJohn said, "There would be a coordinator and a leadman" and reiterated there would not be a supervisor and a leadman on that job— "It's the same."

[28] Asked if any sheet metal worker jobs were available at the time, DeJohn said "Not specific. We tend to run adds at various times just to keep it open . . . ." In fact, according to R. Exh. 9, Respondent hired no installers until June 28 when David Schoolen was hired as an apprentice mechanic/installer.

[29] DeJohn does not dispute that he recognized several of Venglarcik's former employers as union-signatory contractors.

[30] Asked what he said, DeJohn said, "Well, most of it would have been during the course of when we were going over the document and that position. There were inferences there, and then at the end, it was 'Well, I'll keep you informed on my position for that position.'"

Venglarcik for the project coordinator job, and that he placed Venglarcik's employment application in a project coordinator applications file, which he maintains.[31] Venglarcik specifically denied that he and DeJohn ever discussed the position of project coordinator during this interview and, notwithstanding DeJohn's positive feelings, Respondent eventually hired Richard Hill "sometime in June" as the Corcoran State Prison project coordinator.[32]

While not disputing the fact that Venglarcik was called back for another job interview in mid-August, Respondent's witnesses offered no testimony regarding the underlying circumstances. Thus, although acknowledging being aware of the alleged discriminatee's second interview, Russ DeJohn denied any knowledge as to whose decision it was to reinterview Venglarcik.[33] Further, while confirming that he was the management official who conducted the second interview of Venglarcik, Steve Santos denied any arrangement and suggested that such was mere happenstance—"He walked in, and I just happened to be at the counter. There was no appointment."[34] In any event, Santos, who averred that he only subsequently became aware "that [Venglarcik] had applied for a position months back when [DeJohn] was interviewing for a construction coordinator," testified that his conversation with Venglarcik occurred "at the front counter in the office" and lasted no longer than 15 minutes; that they spoke of Venglarcik's prior work experience, and that he told the former Respondent's shop was nonunion, an "open shop." Asked if he did any reference checking after speaking to Venglarcik, Santos said, "I think the next day I asked a few employees if they had known him." Specifically, "I asked Manuel Martinez and Kenneth Maldonado,"[35] and "they both said that they had worked with him in the past. . . . Manuel . . . felt that he wasn't up to par and couldn't perform the work . . . to our standards."[36] As to Maldonado, his "opinion was that [Venglarcik] wasn't worth hiring."[37] Based on these adverse recommendations, Santos decided not to hire Venglarcik—"I didn't feel I had a position to put him . . . And I didn't feel that he had a good reference. As to whether Respondent was hiring at the time, during cross-examination, Santos initially averred that no sheet metal worker/installer positions were open at the time; however, he later admitted that three individuals (Maldonado, who was recommended for hire by Manuel Martinez[38]; Jason Israelian, a former employee; and Ramiro Munoz) were hired as installers within 2 weeks of his interview of Venglarcik.[39]

As to the consolidated complaint paragraph, pertaining to Respondent's allegedly unlawful suspension of Charles Whitehead in July, Russ DeJohn testified on behalf of Respondent and stated that it was his decision to suspend the alleged discriminatee for a week. According to DeJohn, he spoke to Whitehead on the day of his suspension, a Friday, in his office "in reference to the prevailing wage not being paid correctly, and things of that nature that were ongoing complaints . . . . He questioned why, on a prevailing wage project in El Portal . . . [the wage rate] was not a journeyman wage rate versus an apprentice wage rate."[40] DeJohn added that this "did not" cause his suspension. Rather, "what led to [his suspension] was this ongoing, continuing complaining, griping, not that day, but prior to that day"— an "accumulation." Continuing, DeJohn testified that "the final decision was made based on the continuing, ongoing complaining, disruption of work, et cetera that we just were not going to tolerate any more." Asked when the final decision was made, DeJohn stated, "I couldn't give you an exact time, but it would have been in the afternoon sometime." Respondent offered no corroborative evidence for DeJohn's assertions nor did DeJohn offer any explanation for the remarks in the suspension notice, which was given to Whitehead.[41]

With regard to the union logo T-shirt incident at the Corcoran State Prison, Manuel Martinez, who stated he was Respondent's supervisor[42] for the job, testified that, on the morn-

[31] Asked why he did not place the file in his foreman/leadman file, DeJohn stated that "my interest in him as a coordinator, I have these other resumes, so I inserted it with those in this file."

[32] Hill specifically applied for the position, and, according to DeJohn, "I felt, with his resume and the details listed in there . . . and knowing the general contractor that we were working with on this project . . . his qualifications would definitely handle" the job.

[33] DeJohn conceded that, during his interview, Venglarcik said that "He was open for a job."

[34] Santos placed the interview on the same date of Venglarcik's second application—August 14.

[35] R. Exh. 9 establishes that Maldonado was not hired until 5 days after Santos spoke to Venglarcik.

[36] Martinez corroborated Santos that he was asked about Venglarcik, with whom he had worked "years ago," and "I just said that he was not that good. I said he couldn't dribble a basketball."

[37] Ken Maldonado testified that he had previously worked with both Martinez and Venglarcik for another company and that both Santos and Martinez spoke to him about Venglarcik, asking "how we worked together, me and Fred." Placing the Martinez conversation "maybe a week or two after [being hired by Respondent]" perhaps "could have been a month," "[Martinez] just said Fred put in an application. . . . And he asked me what I thought about him." According to Maldonado, he responded that he had worked with the alleged discriminatee while the latter was just an apprentice, and "'he didn't show me any skills . . . that would help us out there at the prison. . . .'" According to Maldonado, Martinez and Santos then together asked him what he thought about Venglarcik, and "I said he wouldn't work out."

[38] Both Martinez and Maldonado were members of the Union, and knew each other and Venglarcik from having worked on union jobs.

[39] Russ DeJohn testified that Israelian had worked as a journeyman sheet metal worker for Respondent during the summer of 1995 but that he had never worked at a prison before; that Maldonado had never worked on a prison job before; and that Munoz was hired as an installer but was not sent to the Corcoran job.

[40] Questioned with regard to the Albertson's incident on July 11, Manuel Martinez averred that "I really don't know what went on" and that he does not recall sending Whitehead home from the job. Asked if he reported to Respondent's office that Whitehead had caused a problem there, Martinez testified, "I might have. I don't recall right now."

[41] During his cross-examination, asked if he ever told either Santos or DeJohn that Whitehead had a bad or poor attitude, Manuel Martinez said, "I think I told him, Steve Santos, more than one time that he had a poor attitude." Asked what this was, Martinez said, "Just gripes. His gripes about . . . anything on a certain job." Martinez added that Whitehead's suspension "didn't have nothing to do with me . . . ."

[42] DeJohn classified Martinez as Respondent's foreman/leadman on the Corcoran job; while the latter categorized himself as Respondent's supervisor on the project and Kenneth Maldonado as his leadman. In any event, Martinez described his duties at Corcoran as ensuring "the people go to work" and "mak[ing] sure the material gets there . . . ." As to the former, Martinez said his job is to "line out" the crew, with him deciding "which men I want in which building." He added that, while "from experience . . . I kind of know what's going on," his crew does not know the jobs to do each day without him telling them and that he bases his decision on which men to assign to the various jobs on "their qualification and what material I have in hand to work with . . . ." Also, according to Martinez, he "sometimes" moves personnel from job to job. With regard to his other responsibilities, Martinez says that he has recommended hiring certain individuals and, as with Maldonado,

ing at issue, as he normally does, he spoke to the employees on his crew at the Corcoran II work area and, while doing so, observed Whitehead wearing "a tan-brown jumpsuit that zips up from his waistline all the way to his neck." Then, according to Martinez, he left the work area and did not return until 2 hours later and, on doing so, noticed that the alleged discriminatee had taken off the jumpsuit and was working in a blue T-shirt,[43] "and I questioned him about it." Martinez reminded Whitehead that "'we've got a dress code around here.' He came out with an attitude. You know, 'You going to fire me now for wearing this shirt' . . . . He was being loud. . . . He was washing it out to everybody . . . . I said, 'Charlie, what's going on and what's the problem.'" Continuing, Martinez recalled that "[Whitehead] kind of argued with me. I just kept my mouth shut, and he did all the screaming and yelling and arguing . . . . Because he was wearing a blue shirt, and I asked him to take it off and put his jumpsuit back on." Martinez further testified that "the problem was he was saying that I was going to fire him for wearing [the blue T-shirt]. And I was just asking him, 'No I'm not going to fire you for it. I want you to put your jumpsuit back on and go back to work.'" Thereupon, according to Martinez, he telephoned Steve Santos, "and I . . . told him what was going on." Santos instructed the foreman to send Whitehead back to the shop "so that's what I did." Finally, Martinez admitted that, during the confrontation, Whitehead pointed at another employee, who was wearing a blue shirt that day—Adam Bernal. Martinez, who denied having explained the dress code to Bernal, turned to the latter and "told him he needed to . . . start wearing other shirts than the color he's wearing . . . ." Bernal asked if he should go home, and Martinez asked if he was going to comply with the dress code from then on. Bernal said he would, and "that was it with Adam."[44]

During cross-examination, Martinez described Whitehead's T-shirt as being blue with Union covered with union logos. Asked what was causing Whitehead to be so upset during their confrontation, Martinez first asserted he became upset over having to remove the blue shirt and then asserted, "He was upset because he thought was firing him." However, Martinez then conceded that what Whitehead was yelling and screaming about concerned his objection to having to remove his Union logo T-shirt—" Yeah, that's probably what he said." Further, during cross-examination, with regard to Adam Bernal, Martinez admitted he was not a new employee. Rather, Bernal had worked for Respondent 4 or 5 years prior to the Corcoran job and had been rehired prior to the prison job, working in the shop and at another job before being transferred to Corcoran.

Russ DeJohn testified that he became aware of the T-shirt incident on being informed by Santos that Whitehead had been sent back to the shop from Corcoran and that he did have a conversation with Whitehead in Respondent's office later. According to DeJohn, the conversation began with Whitehead asking why he was sent back to the shop and was he being fired. DeJohn replied that he was not being fired, that he was dressed in violation of the dress code, and that he would need to dress properly in order to return to work. Whitehead replied that others were dressed as he was and asked why he was being singled out. DeJohn responded that his shirt was the wrong color and that he had to change it. Whitehead refused, asking if he was going to be fired. DeJohn repeated that he was not being fired but just had to adhere to the dress code. DeJohn further testified that, from that point, the conversation seemingly just repeated itself. Finally, he and Ray Griesner told Whitehead "that he can . . . stay there and work in the shop or change and go back to Corcoran. DeJohn also stated that, during the conversation, Whitehead asked if there would have been a problem if the T-shirt was white with the identical union logos and writing, and he replied, "Well, its the navy blue colors are a problem . . . you could not wear blue, black, or orange." Further, DeJohn specifically denied telling Whitehead he had to change his shirt in order to work in the shop. Finally, Respondent failed to call Ray Griesner as a witness with regard to what he allegedly said to Whitehead on the latter's arrival at Respondent's facility.

B. Legal Analysis of Alleged Unfair Labor Practices

Initially, with regard to the consolidated complaint allegation that, on or about May 30 and since said date, Respondent has unlawfully refused to hire Fred Venglarcik, analysis of the respective credibility of the principal witnesses is required. In this regard, I was impressed by the testimonial demeanor of the alleged discriminatee, who, at all times, appeared to be testifying in an entirely candid and straightforward manner. In contrast, I found that neither Russ DeJohn nor Steve Santos exhibited the same degree of candor, as did Venglarcik, while testifying, and, instead, appeared to be testifying in a manner designed to bolster Respondent's defense to the above unfair labor practice allegations. Accordingly, whenever their respective testimony has been in conflict, I credit the testimony of Venglarcik over that of DeJohn and Santos and shall rely on the former's version of what occurred.[45] Therefore, I find that, on answering Respondent's advertisement for an installer/ leadman[46] and obtaining an employment application, Venglarcik

Steve Santos has followed some of his recommendations; that he is authorized to send workers back to Respondent's shop for disciplinary or other reasons; and that he is empowered to permit employees to leave work early. Martinez further testified that the extent of a foreman's authority is dependent on his experience (I would say that's probably the way it works) and that newly hired foreman would not have the extent of supervisory authority given to him.

With regard to Maldonado's status as Martinez' leadman, notwithstanding his earlier testimony, DeJohn conceded that Maldonado was also a foreman/leadman on the Corcoran job. Asked if he would classify Martinez and Maldonado the same, DeJohn said, "For a given building, the way the job's being run, you could say that." DeJohn maintained that leadman and foreman are interchangeable positions and did not know if Maldonado was ever told he was a foreman.

[43] Martinez described the Corcoran State Prison dress code for contractors as prohibiting blue shirts, black shirts, and blue and black jeans.

[44] Unlike Whitehead, Martinez did not enforce the dress code against Bernal that day "because he had just started working for us ."

[45] I shall rely on the testimony of DeJohn only when uncontroverted or corroborated by other record evidence.

[46] Par. 6(a) of the consolidated complaint and counsel for the General Counsel allege that a question asked by a woman, to whom Venglarcik spoke, by telephone, when he answered Respondent's advertisement, constituted unlawful interrogation, violative of Sec. 8(a)(1) of the Act. The individual, characterized by counsel for the General Counsel as Respondent's receptionist, is alleged in the consolidated complaint to be an agent of Respondent. However, there is not a scintilla of evidence in the record as to the woman's identity, her position, her duties, or, indeed, her relationship to Ray Griesner or any other management official. The most recent case, cited by counsel for the General Counsel in support of the consolidated complaint allegations, notes that "the test for agency is whether, under all the circumstances, an employee would reasonably believe that the alleged agent

completed the application on which he requested a job as a sheet metal worker, returned with it to Respondent's Fresno shop and office facility, and spoke to Ray Griesner, the owner; that, after reviewing the document, Griesner asked Venglarcik what work he had done for each of the listed former employers, many of which were union signatory contractors; that, then, Griesner "asked me if I was still a member of the Union; and that, after Venglarcik said no, Griesner asked if he . . . had . . . ever worked at a non-union establishment." I further find that, approximately a week later, the alleged discriminatee was interviewed by Russ DeJohn in the latter's office; that, without being specific, Venglarcik said he just wanted a job; that, after questioning Venglarcik about his previous employers and the jobs on which he worked as a foreman, DeJohn said that Respondent was seeking someone with experience working at prisons and asked if the former had ever been a foreman on a prison job; that, after Venglarcik answered affirmatively, DeJohn handed him a copy of Respondent's foreman/leadman job description and said the latter's work experience qualified him for the position; that, after discussing salary, DeJohn asked the alleged discriminatee about his membership in the Union and, searching through papers on his desk, said "there was some sort of form . . . I needed to sign to waive my Union affiliation"; and that the meeting ended with DeJohn saying he would review Venglarcik's application with Griesner and some "associates there." Next, I find that, a week later, Venglarcik telephoned DeJohn, who told the former his application had been reviewed and "they were still working on something about my Union affiliation . . . . and they were trying to work around [it]" and that, after Venglarcik asked if his union membership was adversely affecting his hiring prospects, DeJohn responded "not in a direct way that it was, but in a way it was." Also, I find that, in mid-August, subsequent to the filing of the instant representation election petition by the Union, on receiving a telephone page from Respondent and being informed by an unidentified individual that he was still being considered for a position and that Respondent wanted him to return for another interview, Venglarcik returned to Respondent's office; that he was approached by Steve Santos, who requested that he complete another employment application; that Venglarcik did so in front of Santos; that, while the former was writing, Santos "wanted to know if I ever ran work as a foreman" and "asked me if I had ever worked in a non-union shop"; and that Santos then explained some of the job duties of Respondent's foremen and said he would speak to Griesner about hiring the alleged discriminatee. Finally, I find that while, at the time Venglarcik was interviewed by Griesner and DeJohn, there were no jobs available for installers or foremen/leadmen,[47] there were leadman and installation jobs available at the time of his interview by Santos.

In determining whether Respondent acted unlawfully by failing and refusing to hire Fred Venglarcik, I must utilize the analytical framework, set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and in *Lewis Mechanical Works*, 285 NLRB 514 at 514 (1987). Thus, in order to prove a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel has the burden of establishing that the alleged discriminatees engaged in union activities; that Respondent had knowledge of such conduct; that Respondent's actions were motivated by union animus; and that the discharges and layoffs had the effect of encouraging or discouraging membership in the Union. *WMRU-TV*, 253 NLRB 697, 703 (1980). Further, the General Counsel has the burden of proving the foregoing matters by a preponderance of the evidence. *Gonic Mfg. Co.,* 141 NLRB 201, 209 (1963). However, while the above analysis is easily applied in cases in which a respondent's motivation is straightforward, conceptual problems arise in cases in which the record evidence discloses the presence of both a lawful and an unlawful cause for the allegedly unlawful conduct. In order to resolve this ambiguity, in *Wright Line*, supra, the Board established a causation test in all 8(a)(1) and (3) cases involving employer motivation. "First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. at 1089. Three points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie showing of unlawful animus, the Board will not "quantitatively analyze the effect of the unlawful motive.The existence of such is sufficient to make a discharge a violation of the Act." Id. at 1089 fn. 4. Second, once the burden has shifted to the employer, the crucial inquiry is not whether Respondent could have engaged in the discharges and layoffs here, but, rather, whether Respondent would have done so in the absence of the alleged discriminatees' union activities and support. *Structural Composites Industries,* 304 NLRB 729 (1991*); Filene's Department Stores*, 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which "the defense of business justification is wholly without merit" (*Wright Line*, supra at 1084 at fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Anderson & Co.,* 291 NLRB 39 (1989). Finally, in alleged hiring discrimination cases, such as involved here, in order for counsel for the General Counsel to meet her burden of proof, it is necessary that she establish the availability of a job, which was denied to the alleged discriminatee. *Casey Electric,* 313 NLRB 774 at 774 (1994).

Here, I believe that counsel for the General Counsel has met her burden of proof that Respondent was unlawfully motivated in failing and refusing to hire Venglarcik as an air-conditioning

was speaking for management and reflecting company policy." *House Calls, Inc*., 304 NLRB 311 (1991). Further, in both *House Calls, Inc*. and *Diehl Equipment Co.,* 297 NLRB 504 (1989), the Board based its finding of apparent authority on the position and job responsibilities of the alleged agents, and, in particular, I note that Venglarcik had no idea as to the identity or job responsibility of the woman, with whom he spoke. Thus, other than the content of the woman's question, there is no evidence herein on which to make any findings as to apparent authority. Accordingly, as there is insufficient evidence to establish that Venglarcik could reasonably have relied upon the individual as speaking on behalf of Respondent as its agent, I must recommend dismissal of par. 6(a) of the consolidated complaint.

[47] The record establishes that Respondent did not hire an installer until the end of June and that it planned to utilize Manual Martinez as its foreman at Corcoran State Prison. Further, while a leadman was eventually hired for that job, DeJohn was uncontroverted that, as of late May and June, Respondent had not yet clarified its hiring plans for the hiring of a leadman for the prison job.

installer in August.[48] At the outset, Respondent is a nonunion contractor, and the alleged discriminatee has been a member of the Union for, at least, 10 years. In this regard, I believe that, notwithstanding Venglarcik's denial of current union membership to Ray Griesner, given his prior employment by union signatory contractors, a fact about which Griesner[49] and DeJohn were aware, Respondent suspected his continued membership. Thus, after reviewing the prior employers, listed, by Venglarcik, on his employment application, Ray Griesner, the owner of Respondent, asked him if continued to be a member of the Union. Likewise, after discussing the alleged discriminatee's previous work experience, Russ DeJohn asked Venglarcik about his union affiliation. "Interrogation of prospective employees [about their union sentiments] by a high company official is definitely coercive and interferes with an employee's rights." *NLRB v. Tesoro Petroleum Corp.*, 431 F.2d 95, 96 (9th Cir. 1970).[50] Moreover, such signifies the employer's "significant" aversion to the employment of prounion applicants and, therefore, the questions, posed by Griesner and DeJohn, were violative of Section 8(a)(1) of the Act. *American Signcrafters*, 319 NLRB 649, 651 (1995); *Lewis Mechanical Works*, supra at 519. Further, Griesner and, later, Steve Santos questioned Venglarcik as to whether he had ever worked at a nonunion shop. Said questions represent coterminous inquiries regarding either the alleged discriminatee's membership in the Union or his willingness to work for a nonunion contractor; in either case, such interrogation of an employment applicant is inherently coercive and blatantly violative of Section 8(a)(1) of the Act. *Casey Electric*, supra at 785; *Honda of Hayward*, 307 NLRB 340, 349 (1992).[51]

Besides by the foregoing unlawful interrogation of Venglarcik, Respondent's longstanding antipathy[52] toward the Union, is demonstrated by other statements, made to him by DeJohn. In this regard, during the employment interview, DeJohn told Venglarcik that he would have to sign a form, waiving his union affiliation. "It is axiomatic that such agreements and their solicitation are barred under the 8(a)(1) prohibition of coercion directed at employee exercise of rights protected by Section 7." *Eddyleon Chocolate Co.*, 301 NLRB 887 at 887 (1991). Accordingly, DeJohn's comment was coercive and violative of Section 8(a)(1) of the Act. Also, during their subsequent telephone conversation, DeJohn told Venglarcik that Respondent was "trying to work around" the latter's union membership, and, when asked, by Venglarcik, if his union membership was detrimental to his chances of being hired, DeJohn indirectly said that it was. The Board has held that any statement, by an

[48] Venglarcik applied for a sheet metal worker job. During his interview, by DeJohn, the alleged discriminatee told the former he just wanted a job and, clearly, the interview began as one for a sheet metal worker/air-conditioning installation job, a position for which Respondent normally retained the names of qualified applicants. While the interview obviously then evolved into one for a foreman/leadman position and the matter is not free from doubt, I believe that, as Venglarcik was qualified and willing to perform installation work and as DeJohn acknowledged Venglarcik's proficiency for said job by speaking to him about a foreman/leadman position, the interview must be considered as being for both positions. However, to the extent that Respondent failed and refused to hire Venglarcik as a sheet metal worker in late May or early June, I note that there do not appear to have been any journeyman sheet metal worker or air-conditioning installation positions available at the time of his application and interviews. On this point, Respondent's records reveal that no installers were hired until, at least, the end of June. Accordingly, counsel for the General Counsel has not met her burden of proof on this issue.

As to the foreman/leadman position, while each of Respondent's incumbent foremen/leadmen, including Artist Morgan and Manuel Martinez, was included, by Respondent, on the voter eligibility list and while each voted without challenge, the Board has long held that, notwithstanding litigation in an underlying representation matter, a question of supervisory status may always be relitigated in an accompanying unfair labor practice matter (*Adco Electric*, 307 NLRB 1113, 1119 (1992)), and the law must be equally applicable in these circumstances. Therefore, as to the merits, it seems clear to the undersigned that those in the position of foreman/leadman for Respondent exercise the authority of supervisors within the meaning of Sec. 2(11) of the Act, with the extent of their authority wholly dependent upon their tenure with Respondent. Thus, both Manuel Martinez, who has been employed by Respondent for 5 years, and Artist Morgan, who had been employed by Respondent for less than a year, were classified as foremen. While the extent of the latter's supervisory authority appears to have been limited to, within his discretion and independent judgment, assigning work to employees on his crew and reassigning them to other work if they were not performing the original assignment to his satisfaction, Martinez possesses authority not only to assign work within his discretion but also to grant time off and to discipline employees by removing them from jobsites and sending them back to Respondent's shop. Martinez explained the difference in their authority as nothing more than a function of job tenure. Sec. 2(11) of the Act is phrased in the disjunctive, and possession of any one of the enumerated indicia of supervisory status provides a sufficient basis for finding supervisory authority as long as the exercise of such is not routine but requires the use of independent judgment. *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Adco Electric*, supra at 1120. The authority to assign work is one of the indicia of supervisory authority. While I recognize that the Board seems loathe to find individuals, who merely independently assign work on job sites and possess no other indicia of supervisory status, to be statutory supervisors (*S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996)), Respondent's foremen appear to gain additional such authority (the power to grant time off and to discipline) over time. Inasmuch as it would be disingenuous to categorize individuals, in the same job classification, as statutory supervisors or not depending only on their job tenure and as using one's discretion in assigning work is an indicia of supervisory authority (*Debber Electric*, 313 NLRB 1094, 1095 (1994)), I believe that a foreman for Respondent must be classified as a supervisor within the meaning of the Act. Accordingly, as "the Board has long held that individuals applying for supervisory positions must be treated as supervisors . . . and not as employees under the Act" (*Ace Machine Co.*, 249 NLRB 623, 634 (1980)), to the extent that Respondent may have been unlawfully motivated in failing and refusing to hire Venglarcik for this position in June and August, such was not violative of Sec. 8(a)(1) and (3) of the Act. Finally, assuming, arguendo, that the foreman/leadman position for Respondent is nonsupervisory, there is no record evidence that such a position was open in late May or early June. Rather, the need for a second foreman/leadman for the Corcoran project had not yet been determined.

[49] The fact that Griesner examined Venglarcik's list of previous employers on his employment application and immediately asked about his union membership patently establishes Griesner's recognition that Vanglaracik had worked for union signatory contractors.

[50] Inasmuch as I believe DeJohn's interview of Venglarcik was for both an installation position and a foreman/leadman position, I find DeJohn's interrogation of Venglarcik to have been violative of Sec. 8(a)(1) of the Act.

[51] Inasmuch as I view Santos' interview of Venglarcik as also having been for both a leadman position and an installer position, the former's union-related interrogation of Venglarcik was unlawful.

[52] Charles Whitehead was uncontroverted that, some time during the fall of 1995, Manuel Martinez warned him that, if he were seen speaking to union officials on a jobsite, he would be sent home for the day. Noting Martinez' failure to deny the warning, I credit Whitehead's testimony.

employer, linking possible employment of an applicant to his union activity, is violative of Section 8(a)(1) of the Act, and I so find here. *Ristorante Donatello*, 314 NLRB 693, 694 (1994).[53] Finally, Respondent's own hiring records establish that, in August, there were installation jobs available, which were filled shortly after Venglarcik was interviewed by Steve Santos. In view of the foregoing, I believe that counsel for the General Counsel has made a prima facie showing that, in mid-August, Respondent was unlawfully motivated in failing and refusing to hire Venglarcik for an air-conditioning installation position.

As to whether it has met its burden of proof and established that it would have refused to hire Venglarcik notwithstanding his membership in the Union, Respondent's position appears to be nothing more than a canard. Thus, having credited the alleged discriminatee's version of the facts, specifically that he was invited back for an August interview, and placing no credence in the contrasting testimony of either DeJohn or Santos, I believe that, as the Corcoran State Prison job was about to commence and as Respondent was in need of installers and a leadman, the two management officials and, possibly, Griesner decided that Santos should reinterview Venglarcik for both jobs[54] and that, in so doing, Santos was well aware of the alleged discriminatee's union membership. The latter did, of course, interview Venglarcik and, subsequently, sought opinions of the alleged discriminatee's work.[55] While Santos testified that he decided not to hire Venglarcik based on poor references and a lack of available positions, neither Manuel Martinez nor Ken Maldonado, the two references, had any recent knowledge of Venglarcik's work record or skills and Respondent's hiring records establish that no less than two installers were hired in the same time period. In short, I can give no credence to the testimony of Steve Santos in these regards. What seems more likely is that Respondent, keenly aware of the ramifications of the pending representation election petition and notwithstanding its hiring needs, decided against hiring Venglarcik as an air-conditioning installer solely because he was viewed as a potential supporter of the Union. Accordingly, I find that Respondent's defense is without merit and that its failure and refusal to hire Fred Venglarcik in August was violative of Section 8(a)(1) and (3) of the Act.

I turn next to the consolidated complaint allegation that, in July, Respondent suspended Charles Whitehead in violation of Section 8(a)(1) and (3) of the Act. In determining whether Respondent's conduct was unlawful, I again engage in an analysis consistent with the Board's *Wright Line*, supra, guidelines and note that, in order to establish a prima facie violation of the Act, the General Counsel must establish that said suspension was unlawfully motivated by Whitehead's suspected support for the Union. As to this, Whitehead was uncontroverted, and I find, that he was the employee, who started the Union's recognition campaign amongst Respondent's employees and that, from May through July, he spoke to employees about the Union and distributed authorization cards. Further, Whitehead was uncontroverted, and I find, that, on July 11, during a break period at a job at an Albertson's grocery market in Fresno, he engaged in a verbal disagreement with his foreman, Manuel Martinez, regarding the Union and the benefits of working in a union shop. Martinez admitted that he might have reported to Respondent's office that Whitehead had caused a problem, and, the next day, Whitehead was given a 1-week suspension by Russ DeJohn. In my view, as it has long been a tenet of Board law in discrimination cases "that the timing of the [employer's conduct] is strongly indicative of animus," Whitehead's suspension, coming 1 day after his argument with Martinez, is suggestive of unlawful animus. *Electronic Data Systems Corp.,* 305 NLRB 219, 220 (1991); *Structural Composites Industries*, 304 NLRB 729 at 729 (1991). Moreover, I am convinced that Respondent's stated reasons for the suspension were merely pretextual, and "it is . . . well settled . . . that when a respondent's stated motives for its actions are found to be false, the circumstances . . . warrant the inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 304 NLRB 970 at 970 (1991); *Shattuck Den Mining Corp.v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Thus, while the suspension notice itself states, as reasons for the suspension, a negative attitude toward Respondent's training program and a "current work load slow down," Respondent failed to offer a scintilla of evidence in support of either assertion. Further, while Russ DeJohn maintained that his decision was based on Whitehead's continued complaining and a resulting disruption of work, Respondent offered no supporting evidence of either constant complaining by Whitehead or of any resulting disruptions of work. In the foregoing circumstances, including the unlawful animus shown toward Venglarcik and Martinez' comment to Whitehead in late 1995, I believe the record warrants the conclusion that Respondent's true motivation for its suspension of Whitehead was the latter's union activities. Accordingly, Respondent's suspension of him was violative of Section 8(a)(1) and (3) of the Act.

With regard to union logo T-shirt incident at the Corcoran State Prison and the consolidated complaint allegation that, on September 13, Whitehead was removed from the job in violation of Section 8(a)(1) and (3) of the Act, given the conflicting versions of Whitehead and Martinez as to what occurred on the jobsite, a credibility resolution is required. As to this, having observed both individuals as witnesses, by his demeanor, I found Whitehead to have been the more candid witness. Moreover, I note that, during cross-examination, after repeating his direct examination assertion that, on the morning at issue, Whitehead "was upset because he thought I was going to fire him," Martinez conceded that what Whitehead was yelling and objecting to that day was the former's demand that he remove

[53] For the reasons set forth above in fn. 50, I find all union-related statements, made to Venglarcik by DeJohn, to have been unlawful.

[54] This, I believe, was the mechanism through which Venglarcik came to be called back by Respondent for another interview. Rather than being buried in the project coordinator file, where it undoubtedly would never have been found, Venglarcik's employment application must have been in either a foreman/leadman applications file or an installer applications file. Said application must have been pulled when Respondent began staffing for the Corcoran job.

[55] The fact that Santos sought the opinions of Martinez and Maldonado, who was hired after Santos' interview of Venglarcik, with regard to the latter's sheet metal work ability convinces me that Santos interviewed and considered hiring Venglarcik as an installer. Thus, DeJohn and Martinez each testified that Maldonado was hired as the leadman at Corcoran. As such a position was no longer open, the logical inference is that Santos sought Maldonado's evaluation of Venglarcik because the latter remained under consideration for hire as an installer. Finally, I reiterate that DeJohn felt the alleged discriminatee was well qualified to be a foreman. It is difficult to understand how he could be qualified for such a position without being qualified to perform journeyman's work.

his union logo T-shirt. Accordingly, crediting the testimony of Whitehead, I find that, prior to reporting to the Corcoran State Prison, he was aware of the requirement that Respondent's employees could not wear blue, black, or orange clothing; that, on the morning of September 13, he was wearing a dark blue union logo T-shirt and blue jeans, with both items covered by beige coveralls; that, at approximately 8:30 a.m. in the morning, another employee drove to the jobsite in a company delivery truck; that the driver was wearing a shirt with a "vote no" button attached to the pocket of the shirt; that, in response, Whitehead removed his coveralls, exposing his blue union logo T-shirt, and commenced working. I further find that, an hour later, Martinez approached, saying Whitehead could not wear such a shirt while working and he had to take it off; that, after Whitehead said he was wearing what he wore to work, Martinez said he could not work, wearing that T-shirt; that, loud enough for his fellow employees to hear, Whitehead shouted that Martinez was saying he could not work in a union logo T-shirt; that Martinez denied having kicked Whitehead off the job and said he only wanted Whitehead to remove the T-shirt; that, after some back and forth arguing, Whitehead removed the T-shirt and said he could not work without a T-shirt; that Martinez then ordered Whitehead to put on his T-shirt and coveralls; that Whitehead refused to put on his coveralls as it was too hot and as he desired to voice his union sympathies; that another employee then pointed out that Martinez himself was wearing a "vote no" button; that Martinez offered to remove it and again asked Whitehead to remove his T-shirt; and that, after Whitehead refused, Martinez ordered him to leave the job and to report to Respondent's office and shop facility in Fresno.

Once again engaging in an analysis consistent with the *Wright Line*, supra, guidelines, I believe that the General Counsel has made a prima facie showing that Respondent was unlawfully motivated in ordering Whitehead off the Corcoran State Prison jobsite that morning. Thus, Whitehead was, of course, the employee-organizer of the union campaign, and Respondent, especially Martinez, was well aware of Whitehead's prounion sympathies. Moreover, given what I have concluded was a suspension resulting from his support for the Union, Respondent's unlawful animus toward Whitehead was palpable. Further, I believe Martinez' attitude, on September 13, resulted from the union logo on Whitehead's T-shirt and not from its dark blue color. Thus, during their confrontation, while he undoubtedly knew he should not have been wearing a blue T-shirt, Whitehead continually insisted that Martinez was demanding he remove his T-shirt because of its logo, an accusation never denied by Martinez. That Martinez was concerned with the union logo on the T-shirt is further demonstrated by his offer to remove his own "vote no" button in return for Whitehead's removal of his T-shirt. Finally, clearly demonstrative of unlawful animus, Respondent's defense appears to be blatantly pretextual. Thus, while Martinez insisted that his reaction to Whitehead's T-shirt was based on its dark blue color and not its union logo, he conceded taking no action against another employee, Adam Bernal, who was also wearing a dark blue T-shirt that day and who, Martinez admitted, was not a new employee, having worked for Respondent on a prior occasion. In these circumstances, I believe that Martinez' removal of Whitehead from the Corcoran State Prison jobsite was motivated by the latter's union sympathies and activities and was, therefore, violative of Section 8(a)(1) and (3) of the Act.

As to the consolidated complaint allegations that Respondent engaged in several acts, violative of Section 8(a)(1) of the Act, I initially discuss Whitehead's uncontroverted testimony, which I credit, that, on September 13, after being removed from the Corcoran State Prison jobsite and then returning to Respondent's office and shop facility in Fresno, he encountered Ray Griesner, who, on noticing Whitehead's union logo T-shirt, yelled, "Get out of my office. Get out of my shop with shirt on." Further, relying on the testimony of Whitehead over that of the significantly less candid Russ DeJohn, I find that, immediately after Griesner's demand, DeJohn walked out of Respondent's office and also "stated that [Whitehead] could not wear this shirt on the job" and that, during a later meeting with DeJohn, the latter reiterated, to Whitehead, "Was out of dress code for the company and . . . I needed to change my shirt and . . . if I did so, I could continue working in the shop for the rest of the day." The right of employees to wear union insignia, while working, as a form of expression is protected by Section 7 of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). However, an employer may limit or ban forever the wearing of union insignia at work if "special circumstances" exist. *Mack's Supermarkets*, 288 NLRB 1082, 1098 (2988). The burden was on Respondent to establish the existence of special circumstances in its shop; however, no such evidence was adduced at the hearing. Accordingly, by demanding that Whitehead remove his union logo T-shirt as a condition for continuing to work in the shop, Griesner and of DeJohn engaged in conduct violative of Section 8(a)(1) of the Act. *Northeast Industrial Service Co.*, 320 NLRB 977 (1996); *Island Counties Legal Services,* 317 NLRB 941 (1995).

Next, various comments and questions, directed at Whitehead by Steve Torres during the 5-week period commencing on July 19, are alleged as violative of Section 8(a)(1) of the Act. As between Whitehead and Torres, notwithstanding the limited testimony of the latter, he failed to exhibit the candor of an honest witness and, therefore, I shall credit and rely on the more straightforward Whitehead. Thus, I find that, at least 10 times during the above time period Torres approached Whitehead and posed questions, such as "Where do you guys meet with the Union?" and "what we thought about the union involvement in the shop." There is no record evidence that Torres, who initiated the questioning and is Respondent's admitted agent, and Whitehead were friends; that Torres had any legitimate purpose in asking such questions, or that he gave Whitehead any assurances against reprisals. Further, inasmuch as some, if not all, of these questions may have been posed prior to the filing of the election petition—at a time when the employees could be expected to have maintained secrecy regarding the Union and at a time immediately after Whitehead's suspension, which was motivated by his union sympathies, rather than the casual and innocuous union-related conversations, which occur in a workplace environment, Torres' questions appear to have been clearly coercive. In these circumstances, I believe Torres' questions were violative of Section 8(a)(1) of the Act. *Twin City Concrete*, 317 NLRB 1313, 1317 (1995); *Cal Western Transport*, 316 NLRB 222 at 222 (1995).[56] Also, on another occasion during the above time period, White-

[56] The consolidated complaint alleges, as unlawful interrogation, various Union-related questions, posed to Artist Morgan by Steve Torres subsequent to the filing of the instant election petition. Inasmuch as I believe Morgan was a supervisor within the meaning of Sec. 2(11) of the Act, such interrogation was not unlawful.

head was having lunch with another employee when Torres approached and began speaking about his own involvement with the Union. Whitehead walked away toward the timecard rack, and Torres followed. Catching up with the former, Torres said, "You know, if the shop decides to go union, Ray will just close the doors." It is, of course, well settled that threats of plant or business closure during an organizing campaign are coercive and violative of Section 8(a)(1) of the Act, and I so find here. *Baby Watson Cheesecake*, 320 NLRB 779, 786 (1996*); Nu-Skin International*, 320 NLRB 385, 391 (1996).

Finally, I turn to the consolidated complaint allegation that Respondent engaged in surveillance of employees' union activities by videotaping a union demonstration outside its office and shop facility in Fresno. In this regard, there is no dispute that, one afternoon in August subsequent to the filing of the election petition, individuals, including officials of the Union, engaged in a demonstration on the public street in front of Respondent's facility; that the individuals carried no placards or signs; that, at no time, did the demonstrators trespass on Respondent's property; that Steve Torres videotaped the demonstration; and that an individual, identified by Torres as Paul Bidard, can be seen on the videotape, speaking to some of the demonstrators. While Torres testified that Bidard is an employee of a neighboring company, a Paul Bedard was listed by Respondent on its election eligibility list, and, based on my prior evaluation of Torres' credibility, I believe that the individual, viewed in the videotape is the same individual, whom Respondent listed as an eligible voter. Inasmuch as such activity tends to intimidate employees by causing them to fear reprisal, it is unlawful to photograph or videotape employees, who are engaging in protected concerted activity. *Sonoma Mission Inn & Spa*, 322 NLRB 898 (1997); *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). While videotaping or photographing in order to document a trespass claim may be justifiable, doing so in the mere belief that something "might happen" does not justify an employer's conduct when balanced against the tendency of the conduct to interfere with employees' right to engage in concerted activity. *Casa San Miguel*, 320 NLRB 534, 538 (1995); *Ordman's Park & Shop*, 292 NLRB 956 (1989). Here, at least one employee was videotaped by Torres, and, as Respondent offered no justification for Torres' actions, Respondent must be found to have violated Section 8(a)(1) of the Act.

The Representation Election

The Objections

The Union's second, third, fourth, and fifth objections to the conduct of the secret-ballot election, which was held on September 17, 1996, are identical to various allegations of the consolidated complaint. Thus, in its second objection, the Union asserts that Steve Torres communicated to employees that, should the Union win the election, Ray Griesner would close down the business. I have previously concluded that, in fact, Torres, Respondent's admitted agent, did utter such a threat to Charles Whitehead and that, thereby, Respondent engaged in conduct violative of Section 8(a)(1) of the Act. However, Whitehead was only able to recall that Torres uttered his warning some time during the 5-week period, which commenced July 19. In these circumstances, one may not conclude with any certainty, that Torres made this comment on or prior to August 5, the date on which the Union filed its petition for the election and the start of the so-called critical period preceding the election. Accordingly, I must conclude that this objection is without merit. The Union's third objection concerns interrogation of employees, regarding their union sympathies and activities, by Steve Torres. Conerning this, I have previously concluded that, several times during the 5-week period which commenced on July 19, Torres questioned Charles Whitehead as to where employees were meeting with the Union and as to what the employees thought about their involvement with the Union and that such interrogation was coercive and violative of Section 8(a)(1) of the Act. While Whitehead was no more specific about the timing of this type of interrogation, which occurred, at least, 10 times, inasmuch as Whitehead recalled that these incidents occurred throughout the 5-week period, one may reasonably conclude that some of Torres' interrogation occurred subsequent to the filing of the election petition and, hence, during the critical period prior to the election. In these circumstances, I find merit to the Union's third objection.

The Union's fourth objection asserts that, through the use of a videotape camera, Respondent engaged in surveillance of its employees' protected concerted activities. In this regard, I have concluded that Respondent engaged in conduct, violative of Section 8(a)(1) of the Act, by videotaping a Union-related demonstration on the public street in front of its Fresno facility one afternoon subsequent to the filing of the election petition. There is no dispute that Respondent's agent Torres was the individual, who performed the videotaping, and that, at least one employee, Paul Bedard, may be viewed on the videotape, speaking to union officials. As I have concluded that said conduct was unlawful, I find merit to this objection. Finally, the Union's fifth objection concerns the Charles Whitehead T-shirt incident on September 13, 4 days prior to the day of the election. I have concluded that, on this day, Manuel Martinez unlawfully, in the presence of other employees, removed Whitehead from the Corcoran prison job based on the latter's refusal to work without wearing a union logo T-shirt and that, on Whitehead's return to Respondent's facility, both Ray Griesner and Russ DeJohn unlawfully threatened not to permit him to work there unless he removed the T-shirt. I have found Respondent's above-described acts and conduct to have been coercive and violative of Section 8(a)(1) and (3) of the Act. Therefore, I find merit to the Union's fifth objection.

The Union's third, fourth, and fifth objections to the election are identical to certain allegations of the consolidated complaint, which I have found to constitute unfair labor practices. Thus, I have found said objections to be meritorious. In these circumstances, I find that Respondent's conduct was sufficiently serious to have destroyed the laboratory conditions, which are required for unfettered selection of a bargaining representative, and to warrant setting aside the September 17, 1996 election. Accordingly, I remand Case 32–RC–4199 to the Regional Director for Region 32 for the purpose of conducting a new election at such time as he deems circumstances permit the free choice of a bargaining representative.[57]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

[57] Inasmuch as I believe that the September 17 election must be set aside and that a new election be held, it is unnecessary to resolve the challenges to the ballots of several voters.

3. By failing and refusing to hire Fred Venglarcik for a sheet metal worker/air-conditioning installation position because of his membership in the Union, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

4. By suspending employee Charles Whitehead for 1 week because of his support for the Union, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

5. By removing employee Charles Whitehead from a jobsite because he wore a T-shirt supporting the Union, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

6. By demanding that an employee remove a union logo T-shirt in order to continue working in its shop facility, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

7. By interrogating employees and applicants for employment as to their union sympathies and activities and those of their fellow employees, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. By threatening an employee that Respondent would close its business if the employees selected the Union as their bargaining representative, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

9. By informing an applicant for employment that he would have to sign a form waiving his right to be or become a member of the Union, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

10. By informing an applicant that his chances of becoming employed by Respondent were linked to his membership in the Union, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

11. By videotaping employees engaged in protected concerted activities without proper justification, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

12. Respondent has not otherwise violated the Act as alleged in the consolidated complaint.

REMEDY

Having found that Respondent has engaged in, and is engaging in, serious unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies and purposes of the Act. I have found that, in mid-August, Respondent failed and refused to hire Fred Venglarcik as an air-conditioning installer because of his membership in the Union. Accordingly, I shall recommend that Respondent be ordered to offer Venglarcik immediate employment as an air-conditioning installer or, if the position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make him whole, with interest, for any losses he may have suffered as a result of its unlawful refusal to hire Venglarcik. Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Also, I have found that Respondent suspended Charles Whitehead for 1 week (July 12 through 19, 1996) and removed him from Corcoran State Prison project for a day because of his support for the Union. Therefore, I shall recommend that Respondent be ordered to make Whitehead whole, with interest, for any losses he may have suffered as a result of its unlawful discipline of Whitehead. Backpay is to be computed in accordance with *F. W. Woolworth*, supra, with interest to be computed in accordance with *New Horizons for the Retarded*, supra. Moreover, with regard to Venglarcik, I shall recommend that Respondent notify him, in writing, that any future employment application will be treated in a nondiscriminatory manner. Finally, I shall recommend that Respondent be ordered to expunge from its files any references to its unlawful suspension and disciplining of Whitehead and to notify him, in writing, that this has been done and that the unlawful actions will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[58]

ORDER

The Respondent, Standard Sheet Metal, Inc., Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire applicants for employment because of their membership in the Union.

(b) Suspending employees because of their support for the Union.

(c) Removing employees from jobsites because of their support for the Union.

(d) Demanding that employees remove union logo T-shirts in order to work in its shop facility.

(e) Interrogating employees and applicants for employment about their union membership, sympathies, and activities and those of their fellow employees.

(f) Threatening employees that it will close its business if the employees select the Union as their bargaining representative.

(g) Informing applicants for employment that they will have to sign a form waiving their right to be, or become, members of the Union.

(h) Informing applicants that their chances of become employed are linked to membership in the Union.

(i) Videotaping employees engaged in protected concerted activities without proper justification.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions deemed necessary to effectuate the purposes and policies of the Act.

(a) Offer immediate employment as an air-conditioning installer to Fred Venglarcik and, if the position no longer exists, employment in a substantially equivalent position without prejudice to his seniority or any other rights or privileges to which he may have been entitled and make him whole, with interest, for any losses, he may have suffered as a result of Respondent unlawful refusal to hire him, in the manner described in the remedy section of the decision.

(b) Within 14 days from the date of this Order, notify Venglarcik, in writing, that any future employment application will be treated in a nondiscriminatory manner.

[58] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Make Charles Whitehead whole, with interest, for any losses he may have suffered as a result of his unlawful suspension from July 12 through 19 and his removal from Respondent's Corcoran State Prison jobsite on September 13 in the manner described in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discipline of employee Charles Whitehead and, within 3 days thereafter, notify him, in writing, that this has been done and that these actions will not be used against him in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Fresno, California, copies of the attached notice marked "Appendix."[59] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on September 17, 1996 be set aside and the case remanded to the Regional Director for Region 32 to conduct a new election when he deems that the circumstances permit the free choice of a bargaining representative.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to hire applicants because they are members of Sheet Metal Workers International Association, Local Union No. 162, AFL–CIO.

WE WILL NOT suspend our employees because they support the Union.

WE WILL NOT remove employees from jobsites because they support the Union.

WE WILL NOT demand that our employees remove union logo T-shirts in order to work inside our shop facility.

WE WILL NOT interrogate our employees and job applicants about their union membership, activities, and sympathies and those of their fellow employees.

WE WILL NOT threaten our employees that we will close the business if our employees select the Union as their bargaining representative.

WE WILL NOT inform job applicants that they will have to sign a form, waiving their right to be, or become, a member of the Union.

WE WILL NOT inform job applicants that their chances of being hired by us are linked to their membership in the Union.

WE WILL NOT videotape our employees in the exercise of protected concerted activities without proper justification.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate employment as an air-conditioning installer to Fred Venglarcik or, if the position is no longer available, employment in a substantially equivalent position without any prejudice to his seniority and any other rights and privileges of employment and WE WILL make him whole, with interest, for any losses he may have suffered as a result of our discriminatory refusal to hire him.

WE WILL, within 14 days of the date of the instant Order, inform Venglarcik, in writing, that any future job application will be treated in a nondiscriminatory manner.

WE WILL make Charles Whitehead whole, with interest, for any losses he may have suffered as a result of our unlawful suspension of him and our removal of him from our Corcoran State Prison jobsite.

WE WILL, within 14 days of the date of the instant Order, expunge from our files any references to Whitehead's unlawful suspension and unlawful removal from the Corcoran State Prison jobsite and inform Whitehead, in writing, that such has been done and that these actions will never be used against him in any way.

STANDARD SHEET METAL, INC.

[59] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."